

APPEAL NO. 93156

On December 4, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, Mr S, who is the respondent, sustained an aggravation, on (date of injury), of a preexisting back injury in the course and scope of employment as manager of (employer), and that he did not give timely notice of the injury to his employer within the time limits set forth in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-5.01 (Vernon Supp. 1993) (1989 Act). However, the hearing officer determined that the claimant had good cause for not notifying his employer timely, because he did not understand until June 20, 1991, that he had a new and distinct injury, and that the claimant exercised the degree of diligence that an ordinarily prudent person would have in going forward with his claim. The hearing officer further rejected the carrier's contention that the preexisting back injury was the sole cause of any incapacity, and determined that the claimant had disability, as that term is defined in Article 8308-1.03(16) for the period from October 29, 1991 through February 26, 1992.

The carrier has appealed, arguing that the hearing officer erred by finding that claimant had good cause, by concluding that claimant sustained a compensable injury on (date of injury), by rejecting carrier's sole cause defense, and by finding that the claimant had disability as a result of his (date of injury) injury. The claimant responded that the decision of the hearing officer should be upheld, and recites evidence in favor of the decision on each of the points raised by the carrier.

DECISION

We affirm the decision of the hearing officer.

I.

FACTS

The claimant testified that he was general manager of the (employer), Texas; this was a supervisory position. Claimant said that he was a "working manager" who would not just supervise, but occasionally assist, his employees in performing their work. The claimant stated that on (date of injury), a Friday, he was helping to unload a truck. When lifting 50lb. boxes of shortening, he experienced back pain and pain down his leg. The pain down his leg was something he had not felt before. However, he stated that he was not a person to complain about his injuries and figured that he had strained a muscle or had a condition that would resolve itself. The claimant stated that he had sustained a back injury in 1988, while employed at another (employer), but that he had not sought medical treatment for that condition since 1989. The claimant said that since the 1988 injury, he had a dull aching sensation in his back that he occasionally relieved with over-the-counter pain medications. Claimant said that he had not lost any time from work as a result of his earlier back injury.

The claimant stated that he was scheduled to assist with a 10 kilometer (10K) charity run that was annually sponsored by the employer. The run took place May 11, 1991, and claimant was assigned as a "pointer" to hold up directional signs to guide the runners. He stated that Friday night, he stayed in a motel at the employer's expense. He stated that he assisted with setting up chairs and tables, but denied that he had lifted any beer kegs. The day of the race, claimant's back got worse. The claimant said that sometime the week of May 13, 1991, he discussed with his own supervisor, (Mr. S), the fact that he had hurt his back. He agreed that he did not tell Mr. S he hurt his back unloading the truck, but stated Mr. S did not ask him. Mr. S did, however, refer the claimant to the person for the employer who was in charge of workers' compensation claims, (Ms. H). A signed statement from Ms. H states that claimant told her his back pains related to his previous injury. The claimant stated that Ms. H referred him to Travelers Insurance, and that the claimant began to work with the adjuster for Travelers, (Mr. E).

The claimant said that Travelers was the carrier with whom he had worked on his 1988 injury. He said that Mr. E told him that it would be to his advantage to file a claim under the new law, because income benefits were higher.¹ The claimant said that he did not feel that he would lose time and wanted to continue to see (Dr. W), an orthopedic surgeon who had treated him earlier. Mr. E then agreed to reopen the old claim. The claimant indicated that Mr. E did not ask him about how the recent back pain was sustained. There was no evidence produced by either party that the claimant knew, or should have known, that Travelers was not the insurance carrier providing coverage for the employer on (date of injury).

Claimant first visited Dr. W on May 28, 1991. No tests were performed at that time, but claimant subsequently had an MRI and discogram sometime around June 13, 1991. He discussed the results of these tests with Dr. W on or about June 20, 1991, at which time he was told that he had a herniated disc, which Dr. W would try to treat conservatively. The claimant said that he told his employer about the (date of injury) incident for the first time sometime in July. The claimant was terminated July 11, 1991. He sought employment, but was unable to find employment, and ultimately had surgery for his back on October 29, 1991. He was not released to any work by Dr. W until February 26, 1992, at which time he was released to light duty with restrictions. He testified that Dr. W did not affirmatively release him during the period from July 12, 1991 through the date of his surgery.

¹ This was referred to by the carrier, during the hearing and on appeal, as the offer of an "option" to file the claim under either new or old law. However, there is no such "option" under either the 1989 Act or its predecessor; the 1989 Act applies to injuries that occur on and after January 1, 1991; the "old" law applies to injuries before that date.

The claimant said that following the diagnosis of disc herniation, Mr. E contacted him and indicated that Travelers' was going to deny further liability for the claim, based upon investigation with Dr. W which indicated a new injury. (A letter dated August 8, 1991 from Mr. E to Dr. W requesting clarification, and Dr. W's August 14th response indicating a new injury, are part of the record). Claimant was subsequently contacted in early August by carrier, whose adjuster was the first person, he stated, to ask him how he was hurt.

Mr. S testified that he was the area manager for a number of stores for the employer. He stated that during the week of May 13, 1991, he was at claimant's store and noticed him limping, and asked him about it. Mr. S stated that his understanding was that claimant said he was injured at the 10K run while lifting beer kegs. Mr. S also said that claimant told him for the first time that he had an earlier back injury relating to his work at another store. Mr. S said that he recalled that claimant told him that he thought he had reinjured his earlier back injury.

Mr. S first said that he did not specifically recall if he referred claimant to Ms. H, who was the person designated by employer to handle workers' compensation, but then indicated under cross-examination that he did. Mr. S said that he would also have referred claimant to Ms. H for questions about insurance generally, although he stated his belief that Ms. H would have in turn referred claimant to other persons for non-compensation related insurance questions. Mr. S stated: "I believe I asked him if he had filled out a workers' compensation insurance claim."

Mr. S agreed that claimant demonstrated prudence in following his advice, and that of Ms. H. He stated that although claimant was terminated on July 11, 1991, because the performance of the (city) store was not within expectations, he gave claimant a good reference and felt that he was hard working and truthful. Mr. S recalled that claimant discussed the (date of injury) injury shortly before his termination.

Mr. S agreed that claimant's pain was obvious. He stated that he understood that claimant's duty at the 10K race was head "pointer," which would not involve moving beer kegs. He was at the race himself, and did not recall seeing the claimant there. Mr. S said that he didn't believe he would have the responsibility to ensure that the claimant reported an injury within a certain number of days after it occurred.

Dr. W's notes from May 28, 1991 indicate a notation of "questionable reinjury." Answers by Dr. W to written questions indicate that claimant's 1988 diagnosis was disc disruption, and that a herniated disc was first diagnosed, at the L5-S1 level, following performance of an MRI and discogram, and this condition resulted in an inability to obtain and retain employment at preinjury wage for the period from June 15, 1991 through

February 26, 1992. Records of Dr. W dated July 15, 22, and September 23, 1991, indicate that claimant's work status is "off work."

Dr. W's stated opinion was that claimant sustained his injury on (date of injury), because the observed condition was in excess of what could be explained as normal deterioration of a simple disc disruption. Against this, the carrier presented no evidence linking to herniated disc solely to the 1988 condition, or to the 10K run.²

II.

INJURY AND SOLE CAUSE ISSUES

The hearing officer's finding that claimant sustained a compensable injury on (date of injury), is sufficiently supported by the record. Claimant's known physical condition prior to (date of injury), was that he had a disc disruption with lower back pain, for which he had not sought treatment for approximately two years. There was no evidence that claimant had sustained a herniated disc as part of his 1988 injury, and the uncontroverted evidence is that he did not. Aggravation of a preexisting condition can be an injury in its own right. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.- Houston [1st Dist.] 1988, no writ). The carrier did not discharge its burden of showing that the claimant's incapacity resulted solely from an incident other than the one which occurred on (date of injury). See Texas Employers Insurance Ass'n v. Page, 553 S.W.2d 98 (Tex. 1977).

III.

GOOD CAUSE ISSUE

The hearing officer's determination that claimant had good cause for not notifying his employer within thirty days of (date of injury), did not constitute an abuse of his discretion, and is sufficiently supported by the record. The failure of an injured worker to appreciate the seriousness of an injury, if entertained by a reasonably prudent person, can constitute good cause for failure to report an injury within thirty days. Baker v. Westchester Fire Insurance Co., 385 S.W.2d 447 (Tex. Civ. App.- Houston 1964, writ ref'd n.r.e.); see also Travelers Insurance Co. v. Rowan, 499 S.W.2d 338 (Tex. Civ. App.- Tyler 1973, writ ref'd n.r.e.). In this case, the claimant stated that he believed that the

² We note that claimant denied he was hurt at the 10K run and this may explain why further evidence was not brought forward about his participation in that event. The evidence does suggest, however, that this social event may have been arguably within the course and scope of employment with Chili's. If we agreed, therefore, with carrier that the sole cause of claimant's injury was the 10K race, further evidence would have to be developed as to whether there was a reasonable expectation of claimant's participation as part of his employer's sponsorship of the race.

pain was essentially a continuation of his earlier injury, he kept on working, and he did not understand that he had a serious injury. Although not specifically noted by the hearing officer, a good cause finding could be based upon the conduct of the employer in this case through its referral of claimant to its workers' compensation person, and then to Travelers', for taking care of the claim. See Texas Employers Insurance Ass'n v. McDonald, 238 S.W.2d 817 (Tex. Civ. App. - Austin 1951, writ ref'd). The sufficiency and scope of what is "notice" under the 1989 Act, and the exceptions thereto, should be liberally determined because the purpose of notice is to allow prompt investigation of facts underlying an injury. Texas Workers' Compensation Commission Appeal No. 92661, decided January 28, 1993.

IV.

DISABILITY ISSUE

Disability under the 1989 Act does is not defined solely in terms of physical impairment, but means "the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury." Article 8308-1.03(16). It need not immediately follow an injury to be compensable. Article 8308-4.22(b); also Texas Workers' Compensation Commission Appeal No. 92399, decided September 21, 1992. Ordinarily, the existence of disability is a question for the finder of fact, and may be resolved inferentially. Director, State Employees Workers' Compensation Division v. Wade, 788 S.W.2d 131 (Tex. App.- Beaumont 1990, writ diss'd). The hearing officer's

decision regarding claimant's period of disability is supported by the record, especially Dr. W's records and deposition.

The decision of the hearing officer is affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas Knapp
Appeals Judge